

# Weathering the Gathering Storm Over Post-Retirement Health Care Benefits — Vested or Not

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The convergence of new reporting standards by the Governmental Accounting Standards Board (GASB), the rising cost of health care, and the huge number of baby boomers nearing retirement age have knocked the public employment sector on its ear. In the past, public employers typically operated on a “pay as you go” model for other post-employment benefits (OPEBs), without reference to any future unfunded liabilities. However, the new GASB rules, which began taking effect in 2005, require public employers to account for and disclose their outstanding future OPEB liabilities, in much the same way they are required to do for pension benefits. Although OPEBs include benefits like post-employment life insurance plans, disability, and long-term care, retiree health care benefits account for the bulk of the unfunded OPEBs facing public employers today.<sup>1</sup>

GASB Statements 43 and 45 now require public agencies to report unfunded actuarial accrued liabilities, which will give ratings agencies like Standard & Poor’s real numbers with which to scrutinize public sector retiree health plans and the staggering liability such plans create. This is an epochal development. The ongoing failure to fund these benefits will adversely impact an agency’s credit rating and may severely restrict a public agency’s ability to sell debt.

The GASB rules already are having a huge impact on government employers — mostly because the new guidelines force employers to recognize the fatal flaws of the “pay as you go” approach. Employers must either reject this approach or face economic ruin for a generation to come.<sup>2</sup>

California’s public agencies are just starting to see the scope of the problem. Governor Schwarzenegger’s office announced that the “state’s unfunded liabilities for retiree health care benefits and their dependents are between \$40 billion and \$70 billion....”<sup>3</sup> Retiree health care costs also have exploded in the City and County of San Francisco. From 2001 to 2006, costs quadrupled from \$23 million

to a whopping \$101 million. The Orange County Board of Supervisors recently estimated a staggering \$1.4 billion in liabilities as a result of its unfunded retiree health care benefits.<sup>4</sup> The Bay Area Rapid Transit District likewise is estimating a potentially crippling burden of \$285 million in unfunded liabilities. In total, public employers in California — including the state government and nearly 6,400 local governments, school districts, and special districts — must begin reckoning with a total liability that could reach over \$200 billion.<sup>5</sup>

The problem is grave. The wildly increasing cost of health care and the ever increasing number of employees and retirees in their health care systems will take an even bigger toll on general fund budgets.<sup>6</sup> A “pay as you go” approach to funding retiree health benefits will be little more than a palliative for public agencies that are already straining to bear the weight of increasing liabilities as revenue growth diminishes.

Some governmental entities in California are taking steps to address the financial imbalances associated with unfunded retiree health benefits. Some of these measures are more definite and committal than others. On September 30, 2006, Governor Schwarzenegger signed into law an amendment to the County Employees Retirement Law of 1937 that enables counties to set up Post-Employment Benefits Trust Accounts to allocate monies for future retiree beneficiaries.<sup>7</sup> On March 1, 2007, the California Public Employees’ Retirement System launched a program permitting its members to opt into a plan to prefund their OPEB. Employers may begin placing funds to be held in trust, earning interest, to pre-fund their liabilities. Similarly, BART has reached an agreement with union representatives to set up a trust and create a payment schedule to cover ballooning liabilities.<sup>8</sup>

Santa Clara County has been prepaying a large portion of its future costs for several years and recently modified eligibility requirements to reduce future outlays.<sup>9</sup> San Diego’s Board of Supervisors worked aggressively to reduce the \$30

million it spends annually for retiree health care benefits by eliminating payments of health care premiums for most people who retired after March 2002.<sup>10</sup> The Peralta Community College District worked with union representatives to pass a bond measure to pay for future unfunded liabilities.<sup>11</sup> The Orange County Board of Supervisors also worked with its major unions and agreed to reduce the county’s estimated \$1.4 billion in unfunded retiree health care liabilities

by \$578 million.<sup>12</sup> Sonoma County recently passed a resolution amending the health plan design requiring a greater contribution from retired members.

The experiences of Orange County and Peralta Community College District provide varied examples of how public employers are moving to gain control of the massive unfunded liabilities that the GASB 43 and 45 guidelines bring to light without running afoul of public sector collective bargaining law.

Any solution to the problem will require some level of sacrifice, by employees and managers alike. For public managers, the burden will be especially weighty. As stewards of the public trust, managers and employers are

not only called on to implement tough solutions — and thereby engender the potential enmity of their employees — they also must accept the same sacrifices their employees are likely to vigorously oppose. Ultimately, the greater public good depends on the efforts and personal sacrifices of local agency managerial employees. For those who will bear the brunt of the storm, the following information may suggest the means to weather it.

### ***The Core Question: To What Extent Can Public Employers Lawfully Modify or Withdraw a Post-Retirement Health Care Benefit?***

Given the constellation of statutory and constitutional protections afforded to public employees and retired members, vesting rules severely limit public agencies’ options.

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The MMBA and similar statutes covering public employers may prove to be one of the key mechanisms by which retiree health benefits may be modified. In addition, employers under the County Employee Retirement Act of 1937 have stronger options than those under the California Public Employee Retirement Systems. Pension benefits for retired members are, generally, beyond the employer's control, but the 1937 Act may provide relief for their employers. Rules for post-retirement health care benefits for current employees, or future retirees, are in a state of flux, but recent case law suggests that employers may have room to move.

### ***'Vesting' in Public Employment in California: The Legal Terrain***

Among the array of constitutional and statutory obligations is the right of employees "to the payment of salary that has been earned."<sup>13</sup> Benefits like pensions may not be denied to an employee once vested and accrued.<sup>14</sup> Public employers face a number of complex statutory requirements in addition to constitutional obligations. One of the most important statutes is the Meyers-Milias-Brown Act,<sup>15</sup> which requires public agencies and exclusive representatives of recognized employee organizations to meet and confer in good faith regarding matters within the scope of representation. While the MMBA grants a number of rights above and beyond those protected by the state and federal constitutions, these rights are limited and may be superseded by other statutory obligations.<sup>16</sup>

### ***Pension Benefits for Already Retired Employees: Typically Beyond the Employer's Control***

Pension benefits are a form of deferred compensation. Even though the employee's right to receive pension benefits is commonly limited by vesting requirements, an employee's contractual right to *earn pension benefits on the terms offered* is vested on the first day of employment.<sup>17</sup> That

right is not subject to forfeiture.<sup>18</sup> Moreover, the retirement benefits of *already retired* employees are vested and no modifications are allowed.<sup>19</sup>

Case law *permits* modifications to a pension system if changes are necessary to protect the viability of the system.<sup>20</sup> For modifications to be deemed reasonable and therefore sustained, they must "bear some material relation to the theory of a pension system and its successful operation.

Changes in a pension plan that result in disadvantage to employees should be accompanied by comparable new advantages."<sup>21</sup> An increase in an employee's contribution to a pension fund from 2 to 10 percent of salary without comparable, off-setting benefits is unreasonable.<sup>22</sup>

### ***Retirement Health Care Benefits Under the 1937 Act: Shelter for Public Employers***

The County Employee Retirement Law of 1937 provides statutory authority and a mechanism by which many county governments have provided pension benefits for county employees.<sup>23</sup> A county must affirmatively adopt the act for it to be operative. Twenty counties and over

300,000 active employees and retired members in California are governed by the provisions of the act.<sup>24</sup> It grants sole authority for administration of the retirement system in a board of retirement, an entity independent from the county.<sup>25</sup> In addition to traditional pensions, some 1937 Act counties provide supplemental benefits, including cost-of-living adjustments and group life and medical insurance benefits.

California Government Code Sec. 31693 of the 1937 Act specifically permits health care benefits as a supplemental benefit provided along with retirement benefits. Under the 1961 amendments to the 1937 Act, employers were permitted to provide group insurance benefits at their discretion.<sup>26</sup> Section 31691 explicitly states that if a county chooses to provide retiree health benefits, the adoption of an ordinance or resolution doing so "*shall give no vested right to any member or retired member....*"<sup>27</sup>

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When the legislature enacted the 1961 amendments to the 1937 Act, the Los Angeles County Employees Association sent a letter to then-Governor Edmund G. Brown urging him to sign the bill and stated:

Interpretations of existing law on the subject indicate that group insurance benefits may not presently be provided for retired personnel on a contributory basis. Your signing into law of Assembly Bill 1859 would remove any legal bar to inclusion of retired employees within public jurisdiction benefit programs after retirement in counties desiring to provide such benefits.

...

Further, this bill is so worded that it is not mandatory upon counties concerned, but makes permissive ordinances in this field of employee benefits.<sup>28</sup>

As the excerpt indicates, proponents of the bill believed that without its passage, counties would not have the authority to provide contributory benefits to *non-employees*. This legislative history, the non-vesting language of the statute itself, as well as the absence of any contrary case law or published opinions, suggests that a county board of supervisors has unfettered ability to repeal an ordinance passed pursuant to Sec. 31691. The provision of such benefits to both *current employees* and *retired members* may, therefore, be discontinued at the discretion of the county — provided the county follows proper legal procedures.<sup>29</sup>

The statute is silent as to any notice or timing requirements the county must provide for current employees. However, it specifies that the board's modification or repudiation of the ordinance will not be operative as to retired members until 90 days after the board notifies the retired members in writing.<sup>30</sup> (An exception is provided for in Los Angeles County.)<sup>31</sup>

Additionally, the board also may alter the supplemental benefits at any time by modifying the ordinance.<sup>32</sup> The 1937

Act is silent as to the process by which these benefits may be modified for *current employees*. However, as to *retired members*, a county may change the benefits as long as it provides reasonable advanced notice to the recognized group *representing the retired employees* of the county.<sup>33</sup> The recognized representative group is afforded the opportunity to comment prior to any formal action by the county.<sup>34</sup> As used in Sec. 31693, "proposed changes" means "significant changes affecting health care benefits, including but not limited to, changes in health care carriers, plan design, and premiums."<sup>35</sup>

In sum, unlike pension benefits conferred under the 1937 Act, post-retirement health care benefits neither vest immediately at employment, nor are they payable upon retirement if a county adopts a resolution revoking the benefits.

### ***The Vesting Status of Retirement Health Care Benefits for Active Employees: San Bernardino Provides Hopeful Shelter for Public Employers***

In 1978, the Second Appellate District of the California Court of Appeal held in *California League of City Employee Assn. v. Palos Verde Library Assn.* that "fundamental" public employee benefits, such as (1) longevity-based

salary increases, (2) additional vacation awarded after 10 years continuous full-time service, and (3) a sabbatical awarded after six years of continuous service, were protected in the same manner as pension benefits.<sup>36</sup>

However, in 1998, the Fourth Appellate District reached the opposite conclusion. In *San Bernardino Public Employees Assn. v. City of Fontana*,<sup>37</sup> the court concluded that individual employees may not challenge changes to benefits, such as personal leave accrual, longevity pay, or retirement health benefits negotiated under California's collective bargaining statutes.<sup>38</sup> The *San Bernardino* court found gaps in the *Palos Verde* analysis and concluded that once the collective bargaining agreement expired, employees no longer had a le-

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gitimate expectation that the benefits would continue unless renegotiated as part of a successor agreement.<sup>39</sup>

All in all, the *San Bernardino* court's analysis strikes a more harmonious tone with the purposes and nature of collective bargaining under the MMBA than *Palos Verdes*. As the court pointed out, the primary purpose of the MMBA is to provide a mechanism for collective action to resolve disputes between employees and employers.<sup>40</sup> A *Palos Verdes* approach, i.e. one focused on the expectations and effect on individual employees, provides an avenue for individuals to repudiate collectively bargained contract terms. Such an outcome dilutes the collective power of employee groups. It also would make employers fearful and therefore unwilling to make concessions in negotiations with employee representatives on the subject of post-retirement health care benefits.<sup>41</sup> The practical implications of *Palos Verdes* would, in short, lead to less effective negotiations between employers and unions and less collective action by employees. In contrast, *San Bernardino*'s comprehension of the law encourages greater predictability because it relies not on the subjective expectations of every individual who might bring forth a contract claim, but rather on the terms of the collectively bargaining agreement and the statutory authority on which the benefit is based.

For these reasons, *San Bernardino* provides a stronger basis for concluding that post-retirement health benefits are non-vested and revocable at least as to *current employees*. Furthermore, *San Bernardino* also provides support for those employers who explicitly tie post-retirement health care benefits of retired members to the health care benefits of current employees. Thus, employers may be able to negotiate changes and modify benefits with the exclusive representative of current employees.<sup>42</sup>

### ***Health Care Benefits for Current, Not Future, Retirees: San Bernardino Provides Less Shelter for Public Employers***

Whether the *already retired* public employees (and those not explicitly tied to current employees) are subject to the same vesting protections as pension benefits is an unresolved issue.<sup>43</sup> There are very few published cases in California that directly address a public employer's right to modify health benefits of *current retirees*.<sup>44</sup> At least one court has concluded

that retired public employees have a vested interest in promised benefits, *Thorning v. Hollister School Dist.*<sup>45</sup>

In *Thorning*, the court decided in favor of elected school board members who had retired under a policy that granted post-retirement health benefits; the court concluded that the employer could not unilaterally terminate those benefits.<sup>46</sup> The soundness of this holding is subject to some doubt since the *Thorning* court relied on *Palos Verdes* and pre-dated *San Bernardino*. Its analysis, therefore, does not accord with *San Bernardino*'s sounder reasoning and suffers from the same discord inherent in the *Palos Verdes* decision.<sup>47</sup>

A recent case suggests that the reach of *Thorning* is indeed limited, and

that employers may be able to modify benefits as long as they are not altogether eliminated. In 2004, in *Sappington v. Orange Unified School Dist.*,<sup>48</sup> retirees sued over a perceived reduction in a "vested retirement benefit"<sup>49</sup> when the school district changed a 20-year practice of funding the entire subscription cost of a retiree's chosen health plan; the change limited coverage to a maximum for the cost of a health maintenance organization. Retirees who wanted the more expensive preferred provider plan were required to pay the difference. The court held that the retirees did not have a vested right in full preferred-provider coverage. While allowing the change in benefits, the Court of Appeal also observed that the trial court "implicitly found that the policy obligated the District to provide at least one fully paid health

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plan, and [that] the District's provisions of free HMO coverage" satisfied that obligation.<sup>50</sup>

### ***The MMBA — A Pathway to Change Retirement Health Benefits***

The meet and confer requirements of the MMBA add complexity to the seemingly straightforward non-vesting language in the group insurance sections of the 1937 Act.<sup>51</sup> What if, for example, a county signs an agreement with a labor union pursuant to the MMBA and thereby promises a benefit that clearly exceeds the scope of the authority granted under Sec. 31691 of the 1937 Act. The terms of an employment contract or collectively bargained agreement cannot supersede the statutory requirements governing certain topics.<sup>52</sup> Moreover, it is questionable that an agency could agree to allow the benefits to be vested. If an agency were to purport to vest these benefits, such an action would be directly contrary to Sec. 31692, which expressly bars vesting of such benefits. Furthermore, MOU terms that confer benefits on retired members (i.e., formerly covered employees) may very well go beyond the statutory authority of the MMBA itself and might therefore be considered unenforceable.<sup>53</sup>

Outside of the 1937 Act, if an employee retires under existing contract language that clearly and unambiguously promises lifetime benefits, the promises create expectations and the contract terms could be enforceable. Employers need to exercise extreme caution when they negotiate with employee representatives about retirement health care benefits. Employers need to take stock of the promises they already have made, and should qualify and limit the promises they make in future contract negotiations.

### ***Weathering the Upcoming Storm — What's a Public Employer To Do?***

Employers must assess what benefits have been promised and to whom before the agency can scale back commitments and minimize its liability. To assess the extent to which already conferred retiree health benefits are vested, and to be equipped to prepare a strategy for containing these costs, employers should:

- Gather *all* memoranda of understanding, salary resolutions, and/or independent employment contracts;
- Gather all documents used and provided to current employees and retired members concerning their post-employment benefits;
- Gather ordinances, resolutions, or other legislative enactments;
- Analyze what the agency has promised and to what extent these promises are modified by rules, regulations, and other written or oral modifications;
- For employers operating under the 1937 Act, take advantage of the recently enacted amendments that enable counties to set up Post-Employment Benefits Trust Accounts and begin setting aside monies for future retiree beneficiaries.

- For other public employers, especially those who tie their retiree medical benefits to those received by current employees, negotiate changes with the current employees' exclusive representative to modify benefit levels or shift a greater share of the cost to employees and retirees.<sup>54</sup>
- For all public employers, consider whether the solutions adopted by other agencies fit your circumstances. For example, you might follow the lead of Peralta Community College District or the City of Gainesville, Florida, and issue bonds to fund accrued liabilities.<sup>55</sup>

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## Conclusion

GASB Statements 43 and 45 have blown public employers into uncertain waters. Although the non-vesting provision of the County Employee Retirement Act of 1937 gives county employers a firm legal perch from which to proceed, a word of caution is warranted: The non-vesting health insurance provisions of the 1937 Act have not yet been tested in the courts. Nevertheless, absent any other sort of verbal or written promises made by an employer, the language of the act gives employers a strong hand in negotiating with current employee groups.

Given some appellate court discord on the issue of vesting, employers outside the ambit of the 1937 Act face greater uncertainty. The *San Bernardino* decision provides a promising ray of legal hope and some guidance as to how to deal with current employees, unions, and retiree organizations. *San Bernardino* also may have repercussions for retired employees, especially if the active employees who control the retirees' former unions will be able to sell them out for pay raises.<sup>56</sup> In every instance, employers need to take every prudent measure to steer themselves away from financial disaster by negotiating away from unfundable and unsustainable promises and commitments. \*

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## Unfair Practice Charge Processing

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The program was a tremendous success when presented in Northern California, last fall.

The location, program information, and registration will be posted online this summer  
 at <http://www.perb.ca.gov>

1 “You Dropped a Bomb on Me; Uncovering \$1.5 Trillion in Hidden OPEB Liabilities for State and Local Governments” (Mar. 22, 2007) *Credit Suisse, Americas/United States, Equity Research, Accounting & Tax* (on file with author).

2 GASB 43 required governments whose total annual revenues were in excess of \$100 million to comply by December 15, 2005; governments whose total revenues exceeded \$10 million, but were less than \$100 million, were required to comply by December 15, 2006; and governments with less than \$10 million in total revenues are required to comply by December 15, 2007. GASB 45 required compliance effective December 15, 2006, for governments with annual revenues of \$100 million or more; December 15, 2007, is the compliance date for governments with more than \$10 million but less than \$100 million in annual revenues; governments with less than \$10 million in annual revenues face a deadline of December 15, 2008.

3 Press Release, Office of the Governor, “Gov. Schwarzenegger Establishes Commission Addressing Public Employee Pensions, Retiree Health Care Obligations” (Dec. 28, 2006) (on file with author) [hereinafter “December Press Release”]; see also Elizabeth G. Hill, *Retiree Health Care: A Growing Cost for Government, Legis. Analyst’s Off.*, at 1 (Cal. Feb. 2006).

4 “Health Care’s Perfect Storm,” *San Francisco Chronicle*, Nov. 13, 2006, at B6; See generally Christian Berthelsen, “O.C. Board Trims Benefits for County Government Retirees; With a Yawning Fund Gap Ahead, Supervisors Act Despite Pleas During a Packed Meeting,” *Los Angeles Times*, Sept. 13, 2006, pt. B, at 3, (reporting on the board of supervisors meeting at which the board decided to reduce funding for retiree medical benefits while simultaneously raising wages of current employees).

5 Bob Porterfield, “Retiree Health Care Could be a Back-Breaker,” *San Diego Union-Tribune*, Sept. 25, 2006, at A1.

6 California Health Care Foundation, “Benefits in the Balance: The Uncertain Future of Public Retiree Health Care Coverage,” September 26, 2006 at <http://www.chcf.org/press/view.cfm?itemid=125092&printFormat=true> (October 23, 2006).

7 2006 Cal ALS 846; 2006 Cal A.B. 2863; Stats 2006 ch. 846.

8 Lynda Gledhill, “Mounting Benefits Tab Can’t be Ignored; Future in Flux for Retirees’ Costly Health Care,” *San Francisco Chronicle*, Nov. 13, 2004, at A-1 (reporting on San Francisco’s total unfunded liability of \$3 billion, the \$290 million a year that would be needed to begin addressing the problem, and possible ways to manage future costs, such as modifying eligibility requirements and contribution requirements) [hereinafter “Mounting Benefits”]; See also *Piombo v. Board of Retirement of San Mateo* (1989) 214 Cal.App.3d 329, 339.

9 Santa Clara increased the years of service eligibility requirements from 5 to 10 years, and requires employees to have retired

from the county in order to receive benefits and bases benefits on the lowest cost provider. In 1984, the county began setting aside money in investment accounts that now have \$320 million in net assets for retirement health care benefits. Santa Clara’s foresight notwithstanding, its accumulation of net assets has not kept pace with the increase in health care costs, and less than 50 percent of its expected costs are presently covered. “Mounting Benefits,” *supra* note 9, at A-1.

10 Gig Conaughton, “Governments to Struggle with Pension Accounting Rules; Service Benefit Cuts Could be Coming,” *West County Times*, Jan. 2, 2007, available at [http://www.nctimes.com/articles/2007/01/03/news/top\\_stories/1\\_03\\_421\\_2\\_07.txt](http://www.nctimes.com/articles/2007/01/03/news/top_stories/1_03_421_2_07.txt). ; See Leslie Wolf Branscomb, “County Supervisors Vote to Stop Paying Subsidies to Thousands of Retirees,” *San Diego Union-Tribune*, Dec. 6, 2006, at B-1.

11 The district also implemented a two-tiered benefit system that gives new hires medical benefits only until they become eligible for Medicare. Barbara Rose, “Retiree Health-Care Accounting Rule May Become Bitter Pill,” *Chicago Tribune*, Jan. 22, 2006, at 1; see also “PFT, District lead the way in protecting retiree medical benefits; OPEB Bond Sale Finalized in New York,” *The Peralta Teacher*, Feb 7, 2006, Vol. 48, No. 2 (explaining how the plan helps the district meet the GASB 45 requirements and describing the cooperative negotiations between the union and the district).

12 “Health Care’s Perfect Storm,” *San Francisco Chronicle*, Nov. 13, 2006, at B6; See generally Christian Berthelsen, “O.C. Board Trims Benefits for County Government Retirees; With a Yawning Fund Gap Ahead, Supervisors Act Despite Pleas During a Packed Meeting,” *Los Angeles Times*, Sept. 13, 2006, pt. B, at 3; Ilene Lelchuk, “Newsom Casts Eye on Retiree Benefits; Scrutiny Promised as Health Care Costs Triple in 3 Years,” *San Francisco Chronicle*, Apr. 26, 2004, at A-1; See also “Mounting Benefits,” *supra*, note 8, at A-1; *Piombo, supra*, 214 Cal.App.3d at 339.

13 *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-853.

14 *Id.* at 855; *Miller v. State of California* (1977) 18 Cal.3d 808, 815.

15 Gov. Code Secs. 3500 et seq.

16 See e.g. *Round Valley Unified School Dist. v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269. (Under the Education Code, school districts have the absolute right to decide not to reelect probationary teachers without providing cause or other procedural protections to the terminated employees, and without regard to contrary provisions in a collective bargaining agreement.)

17 *Kern, supra* note 13, 29 Cal.2d at 855; *Miller, supra* note 14, 18 Cal.3d at 814.

18 *Kern, supra* note 14, 29 Cal.2d at 855.

19 *Terry v. Berkeley* (the exception allowing pension benefits to be modified to protect the flexibility of the pension system does not



apply to an “obligation due a pensioner after his status has become fixed by the happening of the contingency which made the pension due and payable” ([1953] 41 Cal.2d 698, 702-703 [emphasis added]), and “may not be changed to his detriment by subsequent amendment” (*Id.* at 703); *Wallace v. City of Fresno* (vested retirement benefits are “subject to an implied qualification that a governing body may make reasonable modifications *before pensions become payable* and that *before that time* the employee does not have a right to any fixed or definite benefits.” [1954] 42 Cal.2d 180, 183.). Once the contingency occurs that makes the pension due and payable, the promised benefits generally are not subject to modification.

20 *Wallace v. City of Fresno*, *supra*, 42 Cal.2d at 183.

21 *Allen v. City of Long Beach* (1955) 45 Cal. 3d 128, 131.

22 California Retired County Employee Association, 1937 Act Counties, available at [www.crcea.org/html/37\\_act\\_html](http://www.crcea.org/html/37_act_html).

23 Gov. Code Secs. 31450 et seq.

24 In addition to the 1937 Act, other statutes govern other classes of public sector employees. The California Public Employment Retirement System and the Public Employees’ Medical and Hospital Care Act provide retirement benefits to *state* employees. Over the years, CalPERS has expanded its coverage to include school and other non-state public agency employees. Gov. Code Secs. 20000 et seq. Nearly 1.5 million public employees, retired members, and their families are encompassed in CalPERS. CalPERS offers a defined benefit plan that calculates retirement benefits based on a member’s age, years of service, and highest wages. For additional information on CalPERS, see [www.calpers.ca.gov/eip-docus/about/facts/general.pdf](http://www.calpers.ca.gov/eip-docus/about/facts/general.pdf).

CalPERS also offers its members health benefits through contracts with health maintenance organizations and preferred provider organizations. Public agencies then contract with CalPERS for a variety of plans they offer to employees. Rates and services are set by CalPERS, and public agencies determine how these premiums are paid through the collective bargaining process. The public agency and each employee or retired member, or annuitant, generally contributes a portion of the cost of coverage. Gov. Code Sec. 22890.

The Public Employees’ Medical and Hospital Care Act enables the state to provide health benefit plans to employees through systems such as CalPERS. Gov. Code Secs. 22750 et seq. PEMHCA provisions control any memorandum of understanding or collectively bargained agreement reached pursuant to the Meyers-Milias-Brown Act. Gov. Code Sec. 22753. PEMCHA sets the statutory minimum for contribution by contracting agencies and allows a contracting agency to contribute unequal amounts for current employees and its retired members. See Gov. Code Sec. 22892(c). CalPERS also contains a complicated vesting

procedure based on years of service. Gov. Code Sec. 22893. Any MOU reached between a public employer and an exclusive employee representative is subject to the statutory provisions of PEMHCA. Gov. Code Sec. 22893(a)(2). Public employers who offer health benefits through CalPERS must comply with many more statutory minimums and are fairly constrained in the degree of flexibility it has in modifying its benefits. However, it does allow a public employer to contribute less for retired members than for current employees.

25 California Retired County Employee Association, 1937 Act Counties, available at [www.crcea.org/html/37\\_act\\_html](http://www.crcea.org/html/37_act_html).

26 *Ventura County Board of Retired Employees Assn. v. County of Ventura* (1991) 228 Cal.App.3d 1594.

27 Gov. Code Sec. 31691 (emphasis supplied); see also Opinion No. 86-707, 70 Op.Atty. Gen.Cal. 1, 9 (1987).

28 Letter from Frederick H. Ward, General Manager, Los Angeles County Employees Association, urging the governing to sign A.B. 1959 (July 10, 1961).

29 Gov. Code Sec. 31692 (emphasis supplied); see also 70 Op.Atty. Gen.Cal. 1, *supra*, note 53, at 9.

30 Gov. Code Sec. 31692.

31 The adoption of an ordinance or resolution pursuant to Gov. Code Sec. 31691 in Los Angeles County remains in effect for any current or retired member for as long as the board of supervisors or governing body provides similar benefits to any active member in the county’s service. *Id.*

32 Gov. Code Sec. 31693.

33 *Id.* (Emphasis added.)

34 *Id.*

35 *Id.*

36 *California League of City Employee Assns. v. Palos Verdes Library Dist.* (1978) 87 Cal. App. 3d 135, 140.

37 (1998) 67 Cal. App. 4th 1215, 1223.

38 *San Bernardino* also included a challenge to modification of post-retirement health benefits of current employees; however, the court refused to rule on that issue, finding it was not ripe because no actual benefit changes had yet been made. *Id.* at 1226-1227.

39 *Id.* at 1220, citing *Relyea v. Ventura County Fire Protection Dist.* (1992) 2 Cal.App.4th 875, 882.

40 *Id.*

41 *Id.*

42 The *San Bernardino* analysis is also consistent with a post-*Palos Verdes* opinion of the Attorney General, which found that a school district providing health and life insurance benefits to former board members “may discontinue such benefits upon the commencement of new terms of current board members or as to future new board members.” *Opinion No. 84-505*, 67 Op. Atty.

Gen. Cal. 510, 10 (1984); compare, *Opinion No. 97-103*, 80 Op. Atty. Gen. Cal. 119 (1997) (health and welfare benefits of city council may not be decreased *during current term of office*).

43 Under federal private sector precedent, it is settled law that the vesting of retiree medical benefits is a matter of contractual interpretation. Collectively bargained agreements that unambiguously terminate such benefits upon termination or expiration of the agreement will be enforced. *Murphy v. Keystone Steel and Wire Co.* (7th Cir. 1995) 61 F.3d 560, 565. Equally clear and unambiguous promises of lifetime benefits in a collective bargaining agreement also will be enforced. *Keffer v. H.K. Porter Co.* (4th Cir. 1989) 872 F.3d 60, 62-64.

44 An unpublished case, *Reger v. Orange Unified School Dist.*, addressed modification of the health benefits of current retirees. See 2001 Cal. App. Unpub. LEXIS 2242 or 26 PERC par. 33,010. The court in *Reger* ruled that such a claim was not preempted by the Educational Employment Relations Act because retirees were not “employees,” and therefore need not exhaust administrative remedies by filing an unfair practice charge with the Public Employment Relations Board. *Id.* The retirees’ claim was remanded to the lower court; there is no published record of the eventual outcome of that proceeding.

45 In *Thorning*, during the last meeting in the term of retiring board members, the board voted to grant post-retirement health insurance benefits for 10 years; at its first meeting, the new board voted to suspend payments and cancel the benefit. *Thorning v. Hollister School Dist.* (1992) 11 Cal.App.4th at 1598.

46 *Id.*

47 *Thorning* also relied on California Attorney General *Opinion No. 84-505*, stating that a school district may not “in the absence of constitutional justification” discontinue the health and life insurance benefits of retired board members who already had qualified for lifetime benefits. *Opinion No. 84-505*, 67 Op. Atty. Gen. Cal. 510.

48 (2004) 119 Cal.App.4th 949, 951 (*Sappington* did not cite *San Bernardino* in its analysis.)

49 *Id.*

50 *Id.* at 955.

51 *Glendale City Employees Assn. v. City of Glendale* (1975) 15 Cal.3d 328.

52 *Motevalli v. Los Angeles Unified School Dist.* (2004) 122 Cal.App.4th 97; *Zalac v. Governing Board of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 1070.

53 PERB has not addressed the issue of whether retirees are employees afforded protection under the MMBA. However, it has found that retirees are not employees under EERA. *El Centro Elementary School Dist.* (2006) 31 PERC 10. PERB also has found that retiree organizations are not entitled to collective bargaining rights. *Rincon Valley Union Elementary School Dist.* (1988) 12 PERC para. 19162.

54 If contract language does not explicitly tie the retiree benefits to the benefits of current employees, employers are not able to negotiate to modify the benefits of retirees because they are not employees and retiree organizations are not employee organizations under EERA. *El Centro*, *supra*; *Rincon Valley*, *supra*.

55 In July 2005, Gainesville issued bonds to fund its unfunded actuarial accrued liability, and it is believed to have been the first city in the nation to do so. Michael L. Wiener, *State and Local Government’s Options for Complying with GASB 45’s OPEB Reporting Requirement*, *Section of State and Local Government Law of the American Bar Association*, Volume 29, No. 2 Winter 2006.

56 In *Mayer v. Orange Unified School Dist.*, 2003 Cal.App.Unpub. LEXIS 6346 (2003), an unpublished Court of Appeal case that followed *Sappington*, a school district’s health insurance plan tied the benefits of retired members to the benefits received by current members. The court found that the district did not have a continuing duty to provide retirees with a free-enrollment PPO plan if the district did not do the same for its active employees. The court, in dicta, spoke voluminously about the actual fears of retirees, though not articulated, that there remained a “theoretical possibility that one day the active employees who control the retirees’ former union will sell them out for a pay raise.” The court, exercising judicial restraint, did not address this “theoretical possibility,” but it is not difficult to imagine this occurring, thus engendering a court challenge where the question under review will be whether post-retirement health care benefits are vested in the same manner as pension benefits.

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